IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHARLA TAVARES, individually and as Guardian of the Estate of MIRIAM TAVARES, a minor, and ERIK TAVARES, Respondents/ Cross Appellants, v. EVERGREEN HOSPITAL MEDICAL CENTER aka KING COUNTY PUBLIC HOSPITAL DISTRICT #2, Appellants/ Cross Respondents.	)	No. 62821-6-I DIVISION ONE UNPUBLISHED FILED: April 19, 2010

Cox, J. — Evergreen Hospital Medical Center appeals the trial court's judgment on an adverse jury verdict in this medical malpractice and corporate negligence case. The jury awarded substantial damages to Miriam Tavares based on permanent brain and other injuries that she suffered after her mother arrived at the hospital for Miriam's birth on May 30, 2003. The court's Instruction 22 incorrectly shifted to Evergreen the burden of proof for apportioning any brain injury to Miriam that occurred before and after her mother arrived at the hospital on that date. It further imposed liability for the entire injury on the hospital if the

jury found Miriam's brain injury to be indivisible. Because Evergreen has shown it was prejudiced by the giving of this legally incorrect instruction, we reverse and remand for further proceedings.

Sharla Tavares sought prenatal care from Dr. Debra Stemmerman in 2002.[1] Sharla, having experienced a placental abruption that resulted in an emergency cesarean section (C-section) with her first child, knew that her pregnancy was high-risk. Sharla and her husband Erik discussed a birth plan with Dr. Stemmerman several times throughout Sharla's pregnancy. Most of the discussions centered on the decision of whether Sharla should attempt a vaginal birth after cesarean delivery (VBAC) or whether she should have another C-section. The Tavareses wanted to try a VBAC, if possible, despite contrary medical advice. Dr. Stemmerman eventually told Sharla that she would not allow her to go past 42 weeks with the pregnancy.

Sharla's non-stress tests were normal and reactive throughout her prenatal visits. On May 30, 2003, Sharla saw Dr. Stemmerman for her last prenatal visit. During this visit, Sharla told Dr. Stemmerman that the baby was less active, but Dr. Stemmerman found nothing abnormal in her examination.

Later the same evening, at 7:36 p.m., Sharla called Evergreen's labor and delivery unit and told the person who answered the phone that she was experiencing contractions and was high risk. The person who answered the phone told Sharla that if she thought she was in labor, she should come to the

[1] We adopt the naming conventions used by the Tavareses in their briefing to avoid confusion.

hospital to be checked. The Tavareses arrived at the hospital around 8:25 p.m.

Sharla was evaluated by Carolyn Short, R.N. Nurse Short put Sharla on a fetal monitor to monitor Sharla's contractions and the baby's heart tones. Sometime before 8:58 p.m., Nurse Short noticed decelerations in the fetal monitor and called her charge nurse to review the fetal monitoring strip. A few minutes later, the charge nurse called Dr. Shauni Keys, Dr. Stemmerman's partner, who was on call that evening. Dr. Keys arrived at the hospital at 9:18 p.m. and delivered Miriam by emergency C-section at 9:24 p.m.

Miriam looked dead to Dr. Keys when she was born—listless and pale. Miriam survived the birth, but with significant brain damage, including cerebral palsy.

Erik, individually, and Sharla, individually and as guardian of Miriam's estate, sued for medical and corporate negligence. Their claims against the doctors settled and did not go to trial.

A jury found Evergreen liable to Miriam and awarded her damages exceeding $4,248,000. But the jury also found that Evergreen was not liable to either Erik or Sharla individually and did not award either any damages.

Evergreen appeals. Erik and Sharla cross-appeal.

JURY INSTRUCTIONS

Evergreen argues that the trial court erred in giving its Instruction 22 and that this instruction prejudicially affected the outcome of the trial. We agree.

Jury instructions are sufficient if they permit each party to argue its theory

of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law.[2] No more is required.[3]

"A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact."[4] A trial court is required to instruct the jury on a theory only where there is substantial evidence to support that theory.[5] Trial court error on jury instructions is not a ground for reversal unless it is prejudicial.[6] An error is prejudicial if it affects the outcome of the trial.[7]

Here, the trial court gave its Instruction 22 based on an instruction that the Tavareses proposed. The instruction told the jury:

> If you find that the defendant was negligent and was a proximate cause of [Miriam's] injury, and if you find that any brain injury to plaintiff Miriam Tavares occurred both before and after she arrived at the defendant hospital on May 30, 2003, then the defendant hospital has the burden of proof for segregating that injury before and after she arrived at the hospital. If you further find that that injury is indivisible, then the defendant hospital is responsible for the entire injury.[8]

Evergreen argues that this instruction is not a pattern instruction and has never been approved for use in this type of action. It also argues that the instruction was legally incorrect in that this is not a case of injury caused by successive tortfeasors: Evergreen is the sole alleged tortfeasor for the claims

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[2] Douglas v. Freeman, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991).
[3] Id. at 257.
[4] Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).
[5] Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).
[6] Id. at 498-99.
[7] Id. at 499.
[8] Clerk's Papers at 2319.

submitted to the jury.[9] It further argues that the Tavareses, as guardians of Miriam, failed to meet their burden to prove that Miriam's injuries after arriving at the hospital on May 30, 2003, were indivisible from the injuries that the hospital claimed pre-existed her arrival at the hospital. Evergreen claims prejudice due to the improper shifting of the burden of proof. We agree that this instruction was both legally incorrect and prejudicial to Evergreen.

It appears that the court's instruction was based on the Tavareses' Proposed Instruction Number 28, Segregation of Damages—Generally.[1] They cited Cox v. Spangler[11] in support of this proposed instruction.

In Cox, Deborah Cox sustained injuries when another automobile struck her automobile from the rear in May 1993.[12] Approximately six months later, in November 1993, she again sustained injuries when the automobile she was driving was struck in the rear by another automobile.[13] This second accident was caused by Lynn Spangler.[14] Cox sued Spangler for personal injuries suffered in the second accident.[15]

At trial, expert testimony established that some of Cox's injuries were not capable of apportionment between the two accidents and that other injuries were attributable solely to the November accident.[16] The trial court gave an

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[9] Brief of Appellant at 49.
[1] Clerk's Papers at 2175.
[11] 141 Wn.2d 431, 5 P.3d 1265 (2000).
[12] Id. at 434.
[13] Id. at 435.
[14] Id.
[15] Id. at 436.
[16] Id. at 436-37.

instruction that if the jury found that any of Cox's injuries were "indivisible" between the May and November accidents, then Spangler bore the burden of apportioning damages for the injuries.[17] The jury awarded a substantial verdict in favor of Cox against Spangler.[18]

On appeal, Spangler argued that the instruction shifting the burden of proof for apportioning damages to her was erroneous.[19] This court affirmed.[2] The supreme court granted her petition for review.[21]

The supreme court quoted the instruction at issue as follows:

> If you find that the plaintiff was injured in the accident of May 19, 1993 and the accident of November 2, 1993 and that said accidents caused the plaintiff injury, then the burden of apportioning plaintiff's injuries between the two accidents is upon the defendants. If you further find that plaintiff's injuries are indivisible, then the defendants Spangler are responsible for the entire injury.[22]

The court noted that the language of this instruction was loosely based on Phennah v. Whalen,[23] a case decided by this division of the court of appeals. In Phennah, the plaintiff suffered indivisible injuries in two automobile accidents that occurred some three months apart.[24] In the personal injury action against the parties who caused each accident, the defendants moved to dismiss at the conclusion of the presentation of all evidence.[25] The motion was based on the

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[17] Id. at 437.
[18] Id. at 438.
[19] Id.
[2] Id.
[21] Id.
[22] Id. at 442.
[23] Id. at 443 (citing Phennah v.Whalen, 28 Wn. App. 19, 621 P.2d 1304 (1980)).
[24] Cox, 141 Wn.2d at 443 (citing Phennah, 28 Wn. App. at 20).
[25] Id. (citing Phennah, 28 Wn. App. at 21-22).

plaintiff's failure to present evidence on the basis of which to segregate damages between the "successive tort-feasors."[26] The trial court granted the motion, and Phennah appealed.[27]

This court reversed.[28] The supreme court in Cox quoted the following from Phennah:

> "[O]nce a plaintiff has proved that each successive negligent defendant has caused some damage, the burden of proving allocation of those damages among themselves is upon the defendants; if the jury find[s] that the harm is indivisible, then the defendants are jointly and severally liable for the entire harm."[29]

The supreme court in Cox then noted, with approval, this court's reliance on Restatement (Second) of Torts § 433B (1965) to support the decision in Phennah.[3] The supreme court quoted § 433B:

> "(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
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> (2) ***Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.***
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> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."[31]

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[26] Id. (quoting Phennah, 28 Wn. App. at 21-22).
[27] Id.; Phennah, 28 Wn. App. at 20, 22.
[28] Cox, 141 Wn.2d at 443 (quoting Phennah, 28 Wn. App. at 29).
[29] Id. (quoting Phennah, 28 Wn. App. at 29).
[3] Id.
[31] Id. at 443-44 (boldface emphasis added) (quoting Restatement (Second) of Torts § 433B (1965)).

The court acknowledged that the exception in subsection (2) is grounded in the policy that, as between the proved tortfeasor who has clearly caused some harm and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.[32]

Applying these principles to the Cox case, the supreme court decided that Cox had proved that her "injuries were indivisible between the two accidents."[33] The court stated, "the key similarity between the instant case and Phennah is the indivisibility of Cox's injuries."[34]

Here, the question is whether an exception to the general rule stated in subsection (1) of the Restatement applies. That general rule states:

> Except as stated in Subsections (2) and (3), ***the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff***.[35]

Thus, unless the evidence demonstrates that either or both of the two subsections applies, the burden of proof remains with the plaintiff.

Here, the Tavareses rely on subsection (2) to support the giving of Instruction 22. But the plain words of that subsection show that it is inapplicable to this case. The supreme court, in Cox, emphasized that subsection in citing it with approval:

> "(2) *Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to*

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[32] Id. at 444 (quoting Restatement (Second) of Torts § 433B cmt. d on (2), at 444 (1965)).

[33] Id. at 446.

[34] Id.

[35] Restatement (Second) of Torts § 433B (1965) (emphasis added).

the apportionment is upon each such actor."[36]

Here, the first clause of that rule is critical to defining what follows: "*Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff* . . . ." There is no evidence here of "tortious conduct of ***two or more actors***." The actions and omissions of Evergreen were the sole objects of the tort claim. The trial court's Instruction 13 makes this clear: "Dr. Stemmerman, Dr. Keys, and Sharla and Erik Tavares were not at fault for, and did not proximately cause, Miriam Tavares' outcome in this case."[37]

In short, the allegedly tortious conduct of only one actor—Evergreen—was at issue. Absent a showing of tortious conduct by two or more actors, the exception to the general rule that a plaintiff has the burden of proof does not apply. Thus, it was legally incorrect to shift to Evergreen the burden of proof of apportionment under subsection (2) of the Restatement.

The Tavareses argue that Phennah and Cox support their claim that Instruction 22 is legally correct. As shown above, those cases are both factually distinguishable from this case.

In Cox, the supreme court, quoting comment d to the Restatement, stated,

> The exception in subsection (2) is grounded in the policy that: "[a]s between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former."[38]

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[36] Cox, 141 Wn.2d at 443 (quoting Restatement (Second) of Torts § 433B (1965)).

[37] Clerk's Papers at 2314.

[38] Cox, 141 Wn.2d at 444 (quoting (quoting Restatement (Second) of Torts § 433B cmt. d on (2), at 444 (1965)).

The Tavareses rely on the portion of the above quotation in which the supreme court contrasts the "proved ***tortfeasor*** who has clearly caused some harm" with "the entirely innocent plaintiff" for purposes of explaining the policy underlying shifting the burden of proof away from the plaintiff. Focusing on the singular "tortfeasor" in this quotation, they appear to argue that the supreme court would approve of the giving of Instruction 22 in this case, as it did in Cox.

But in context, comment d to the Restatement cannot reasonably be read to permit shifting of the burden of proof to a single actor whose tortious conduct is at issue. Such a reading would conflict with the plain words of subsection (2) of the Restatement, which the comment explains. The application of subsection (2) is limited to those cases where "the tortious conduct of ***two or more actors*** has ***combined*** to bring about harm to the plaintiff."[39]

In Cox, the supreme court approved the instruction because there were successive tortfeasors and the injuries were indivisible.[4] Phennah had similar facts and reasoning.[41] Thus, neither Cox nor Phennah controls the disposition of this case.

The Tavareses point to other instructions, apparently claiming that when read with Instruction 22, there was no prejudicial error in giving Instruction 22. We conclude that the other instructions do not render the giving of Instruction 22 harmless.

The court's Instruction 8 defines proximate cause:

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[39] Restatement (Second) of Torts § 433B (1965) (emphasis added).
[4] Cox, 141 Wn.2d at 446-47.
[41] See Phennah, 28 Wn. App. at 20.

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.[42]

Instruction 12 states:

In connection with the plaintiffs' claims of injury resulting from negligence, the plaintiff has the burden of proving each of the following propositions:

First, that the defendant failed to follow the applicable standard of care and was therefore negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions have not been proved, your verdict should be for the defendant as to this claim.[43]

Instruction 13 states:

There may be more than one proximate cause of the same injury. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiff, it is not a defense that some other cause may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiff was a preexisting medical condition, then you [sic] verdict should be for the defendant.

Dr. Stemmerman, Dr. Keys, and Sharla and Erik Tavares were not at fault for, and did not proximately cause, Miriam Tavares' outcome in this case.[44]

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[42] Clerk's Papers at 2310.
[43] Id. at 2313.
[44] Id. at 2314.

These unchallenged instructions do not, in our view, overcome the potential prejudice arising from the improper shifting of the burden of proof of apportionment to Evergreen in Instruction 22. At minimum, Instruction 22 conflicts with the proper statement of the burden of proof in Instruction 12. In short, the giving of Instruction 22 likely affected the outcome in this case and was not harmless.

Relying on Wagner v. Monteilh,[45] the Tavareses claim that the giving of Instruction 22 was proper. That case does not support their claim.

In Wagner, a plaintiff sued two physicians for negligently treating his hand injury, which had occurred in an industrial accident.[46] The trial court instructed the jury, "The plaintiffs have the burden of proving the extent to which, if any, the plaintiffs' injuries or damages were increased by the negligence, if any, of one or more of the defendants."[47] Division Three of this court concluded that "Wagner presented evidence of the condition his hand would have been in but for the negligent treatment. . . . Wagner did segregate his damages insofar as reasonably possible as to which injuries were attributable to the initial injury and which were attributable to the negligent treatment."[48] The problem with the instruction was that it gave Wagner "the burden of proving the ***extent*** of damage" caused by the physicians.[49] This was an incorrect statement of the law and potentially confusing to the jury because special damages cannot be fixed

[45] 43 Wn. App. 908, 720 P.2d 847 (1986).
[46] Id. at 909.
[47] Id. at 910.
[48] Id. at 912.
[49] Id. (boldface emphasis added).

with mathematical certainty and "'there need be no evidence which assigns an actual dollar value to the injury.'"[5]

The holding in Wagner is inapposite to the issue before us. The error there was not that the plaintiff had the burden of proof, but that the instruction improperly gave the plaintiff the burden to prove the ***extent*** of damages, including special damages. Here, as we have already discussed, there was no proper basis upon which to shift the burden to Evergreen.

The remaining element that Evergreen must show is prejudice by the giving of this legally incorrect instruction.[51] An error in an instruction given on behalf of the party in whose favor the verdict is rendered is presumed to be prejudicial "unless it affirmatively appears that it was harmless."[52]

The Tavareses do not argue that any error was harmless. Under the circumstances of this case, they would have had no persuasive basis to do so.

Evergreen presented substantial evidence that Miriam's brain injuries occurred before her mother arrived at the hospital on May 30, 2003, for Miriam's birth. Dr. Robert Zimmerman, a pediatric neuroradiologist, testified that in his opinion, within a reasonable degree of medical certainty, Miriam's brain injuries occurred the day before she was born.

In contrast, the Tavareses presented substantial evidence that Miriam's brain injuries occurred after her mother arrived at the hospital. But no one has

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[5] Id. (quoting Rasor v. Retail Credit Co., 87 Wn.2d 516, 531, 554 P.2d 1041 (1976)).

[51] Stiley, 130 Wn.2d at 498-99 (trial court error on jury instructions is not a ground for reversal unless it is prejudicial).

[52] State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

called to our attention any evidence apportioning Miriam's injuries before and after arrival at the hospital. Instruction 22 shifted the burden of apportionment to Evergreen. It further imposed liability for all injuries on Evergreen if it found the injury to be indivisible and if Evergreen failed to prove apportionment. Under the circumstances of this case, this shift in the burden of proof was prejudicial to Evergreen. Remand for a new trial is necessary.

On remand, other issues raised on appeal may again arise. In order to give guidance to the trial court and the parties, we address certain of those issues in the rest of this opinion.

Evergreen's Proposed Instruction 24 and Court's Instruction 21

Evergreen challenges the trial court's decision to refuse its Proposed Instruction 24, which is based on WPI 30.17—Aggravation of Pre-Existing Condition.[53] Proposed Instruction 24 provides,

> If your verdict is for the plaintiffs, and if you find that:
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> (1) before this occurrence the plaintiff had a pre-existing bodily/mental condition that was causing pain or disability; and
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> (2) because of this occurrence the condition or the pain or the disability was aggravated,
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> then you should consider the degree to which the condition or the pain or disability was aggravated by this occurrence.
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> However, you should not consider any condition or disability that may have existed prior to this occurrence, or from which the plaintiff may now be suffering, that was not caused or contributed to by this occurrence.[54]

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[53] Brief of Appellant at 46 (citing 6 Washington Practice: Washington Pattern Jury Instructions: Civil 30.17, at 309 (5th ed. 2005) (WPI)).

[54] Clerk's Papers at 2204.

We first note that review of this claim on appeal is hampered by the failure of Evergreen to except, on the record, to the court's refusal to give this instruction. When the trial court took exceptions from counsel for the parties, Evergreen did not mention its Proposed Instruction 24.[55]

Evergreen's opening brief in this court cites its Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial to characterize the trial court's basis for refusing to give the instruction.[56] The motion characterizes the trial court's reasoning as: "a fetus could not have an injury which could be aggravated."[57] It is unclear to this court whether this is either an accurate characterization of what the trial court said or to what extent it was a basis for the court's reasoning. Had Evergreen excepted, on the record, to the court's decision to give Evergreen's proposed instruction, we would have a better record to review.

Moving to the merits of the claim on appeal, Evergreen argues that its proposed instruction should have been given because it "presented substantial evidence that Miriam had already sustained injury and brain damage prior to her mother's arrival at Evergreen on May 30, 2003."[58] But whether Miriam was ***injured*** prior to her mother's arrival at Evergreen is not the question. Instead, as the plain words of the instruction state, the pre-existing condition must cause ***pain or disability*****.** The note on use of WPI 30.17 confirms this requirement by

[55] Report of Proceedings (Oct. 1, 2008) at 116-17.
[56] Brief of Appellant at 46.
[57] Clerk's Papers at 2629.
[58] Brief of Appellant at 45-46.

indicating that use of the instruction is appropriate "if the pre-existing condition was causing ***pain*** or ***disability***."[59]

While Evergreen points to evidence of Miriam's injuries, nowhere does Evergreen explain why this evidence proves her pain or disability, the relevant standard under the plain language of the proposed instruction. Absent an evidentiary basis for giving the instruction, the trial court did not abuse its discretion in refusing to give Evergreen's Proposed Instruction 24.

Evergreen next argues that the trial court erred in giving its Instruction 21, which is based on WPI 30.18.01—Particular Susceptibility.[6] Instruction 21 provides,

> If your verdict is for the plaintiff, and if you find that:
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> (1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and
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> (2) the condition made the plaintiff more susceptible to injury than a person in normal health, than you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.
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> There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrance [sic].[61]

Evergreen argues that "the Tavareses did not present substantial evidence establishing, to a reasonable degree of medical probability, that Miriam's pre-

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[59] WPI 30.17, note on use at 309 (5th ed. 2005), 263 (Supp. 2009) (emphasis added).

[6] Brief of Appellant at 47 (citing WPI 30.18.01).

[61] Clerk's Papers at 2318.

existing conditions made her more susceptible to the injuries they claim were proximately caused by Evergreen's alleged negligence."[62] The record does not support this argument.

Evidence of Miriam's pre-existing conditions was admitted, without objection, during the testimony of Dr. Stephen Glass, a child neurologist. He testified at length about the role that several pre-existing conditions, including chorioamnionitis, meconium aspiration, and cord inflammation, played in causing Miriam's injuries.[63] Dr. Glass testified that these conditions add "an additional burden of risk to injury" from loss of oxygen and blood flow.[64] He explained,

> The inflammatory response . . . creates a susceptibility factor, which when that infant is then exposed to an hypoxic-ischemic stress, is at greater risk of being injured earlier on the curve rather than later on the curve, and the degree of injury, therefore, would be greater if you're talking about the same points on the curve.
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> Q. Okay. So in other words, the presence of some of these, the chorioamnionitis and funisitis and meconium and inflammation in the umbilical cord, those factors could have predisposed her to a more severe injury with the asphyxia?
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> A. Could have predisposed her to a more severe injury, but by themselves, they don't confer injury.[65]

The essence of Evergreen's challenge on appeal appears to be that this expert did not express his opinion in terms of "a reasonable degree of medical probability."[66] Again, this argument is not supported by the record.

First, near the beginning of Dr. Glass' testimony, he was asked to provide

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[62] Brief of Appellant at 47.
[63] Report of Proceedings (Sept. 9, 2008) at 55-81.
[64] Id. at 80-81.
[65] Id. at 81.
[66] Brief of Appellant at 47.

answers to the questions he would be asked "on the basis of a reasonable medical probability, unless [he] indicate[d] otherwise."[67] He agreed to do so.[68] He also agreed, at the same time, to indicate when he had "a higher level of confidence in [his] opinion than reasonable medical probability."[69]

Second, Evergreen did not object below to Dr. Glass' testimony concerning Miriam's pre-existing conditions. The lack of an objection below, in our view, was most likely based on the fact that Evergreen understood Dr. Glass' testimony regarding pre-existing conditions to comply with his commitment to testify "on the basis of a reasonable medical probability, unless [he] indicate[d] otherwise."

Third, even if our view of Evergreen's reason for not objecting below is incorrect, the fact remains that it failed to object. Thus, the issue was not preserved for review.

For these reasons, we reject the claim on appeal that Dr. Glass did not express his opinion in accordance with governing standards for expert opinion. There was substantial evidence to support the giving of this instruction. We conclude that the trial court did not abuse its discretion in giving Instruction 21.

Evergreen next argues that even if there was substantial evidence to support the giving of Instruction 21, the trial court should have also given Evergreen's Proposed Instruction 24, which is based on WPI 30.17—Aggravation of Pre-Existing Condition. We disagree.

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[67] Report of Proceedings (Sept. 9, 2008) at 11.
[68] Id.
[69] Id.

As we have already explained, the plain words of this proposed instruction require a showing of "pain or disability." The note on Use to WPI 30.17 confirms this by stating, "If the evidence is in dispute as to the existence of . . . pre-existing pain or disability, use both instructions [WPI 30.17 and WPI 30.18 or 30.18.01]."[7]

Here, there was no evidence of Miriam's pain or disability from a pre-existing condition before her mother arrived at the hospital for the birth. The trial court did not abuse its discretion by declining to give Evergreen's Proposed Instruction 24.

Instruction 14 (JCAHO Standard)

Evergreen argues that the trial court erred in giving its Instruction 14. This is unpersuasive.

That instruction was taken from a Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) standard. Evergreen argues that the JCAHO standard does not have the force of law and that it gave undue emphasis to the Tavareses' theories of the case.

To the extent Evergreen argues that the instruction improperly raised a JCAHO standard to the force of law, Evergreen appears to be arguing that the trial court's decision was based on a ruling of law, which we review de novo.[71] To the extent Evergreen argues that the instruction "gave undue emphasis to the Tavareses' theory of the case,"[72] we review for abuse of discretion.[73]

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[7] WPI 30.17, note on use at 309 (5th ed. 2005), 263 (Supp. 2009).
[71] Cox, 141 Wn.2d at 442; Kappelman, 167 Wn.2d at 6.
[72] Brief of Appellant at 50.

Instruction 14 provides,

> The hospital is required to provide an adequate number of staff members whose qualifications are consistent with job responsibilities.[74]

In Douglas v. Freeman,[75] the supreme court, citing Pedroza v. Bryant,[76] acknowledged that it had previously held "that the standards of care to which a hospital should be held may be defined by the accreditation standards of the Joint Commission on Accreditation of Hospitals and the hospital's own bylaws."[77] In Pedroza, the court analogized the proper standard of care for a hospital in a corporate negligence case to the standard for medical practitioners, which requires the degree of care "'of an average, competent practitioner acting in the same or similar circumstances'" rather than a local standard of care.[78] The court recognized that because hospitals are members of national organizations and subject to accreditation, the JCAHO standards are particularly relevant to defining the proper standard of care.[79]

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[73] Kappelman, 167 Wn.2d at 6 ("A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact.").

[74] Clerk's Papers at 2314.

[75] 117 Wn.2d 242, 814 P.2d 1160 (1991).

[76] 101 Wn.2d 226, 677 P.2d 166 (1984).

[77] 117 Wn.2d at 248 (citing Pedroza, 101 Wn.2d at 233-34). The Joint Commission on Accreditation of Hospitals changed its name to the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) in 1987. A Journey Through the History of the Joint Commission, http://www.jointcommission.org/AboutUs/joint_commission_history.htm (last visited Mar. 18, 2010).

[78] Pedroza, 101 Wn.2d at 233 (quoting Pederson v. Dumouchel, 72 Wn.2d 73, 79, 431 P.2d 973 (1967)).

[79] Pedroza, 101 Wn.2d at 233-34.

Here, given the discussions of the role of JCAHO standards in Douglas and Pedroza, the trial court properly gave a standard of care instruction consistent with the language of a JCAHO standard. The instruction was a correct statement of the law as to the applicable standard of care.

Evergreen's claim that the instruction gave undue influence to the Tavareses' theories of the case is also unpersuasive.

The instruction states that "[t]he hospital is required to provide an adequate number of staff members whose qualifications are consistent with job responsibilities."[8] Neither Instruction 14 nor the other jury instructions defined the word "adequate" or identified the meaning of "qualifications [that] are consistent with job responsibilities." Those questions were properly left for the jury to decide after hearing the parties' evidence and arguments.

Additionally, this instruction is not the only one relating to the standard of care. The trial court's unchallenged Instruction 9 also defined the hospital's independent duty of care to exercise reasonable care:

> Defendant Evergreen Hospital is a corporation which owes an independent duty of care to its patients. This includes the duty to: Exercise reasonable care to 1) periodically monitor and review the competency of all labor and delivery nurses employed at the hospital; 2) adopt policies and procedures for health care provided to its patients; and 3) train, support, and supervise its labor and delivery nurses.
>
> "Reasonable care" in this instruction means that degree of skill, care, and learning expected of a reasonably prudent hospital in the State of Washington acting in the same or similar circumstances and at the same time of the care or treatment in question. Failure to exercise such skill, care, and learning is negligence.

[8] Clerk's Papers at 2314.

> The degree of care actually practiced by hospitals is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.[81]

There is no substantial difference between Instruction 14 and this instruction.

The trial court properly gave its Instruction 14.

WAC 246-320-365

Evergreen argues that the trial court erred in failing to rule as a matter of law that WAC 246-320-365 did not require an obstetrician to be physically present in the hospital 24 hours a day, seven days a week. It argues that the trial court further erred in allowing the experts to opine about the meaning of the WAC and allowing the jury to determine its meaning.

Waiver

As an initial matter, the Tavareses argue that Evergreen did not preserve this error for review because it did not assign error to Instruction 15. We need not address this contention in light of reversal and remand for further proceedings on other grounds.

Moving to the merits, Instruction 15 provides,

> Washington Administrative Code 246-320-365 is an administrative rule. The violation, if any, of an administrative rule is not necessarily negligence, but may be considered by you as evidence in determining negligence.[82]

Evergreen repeatedly asked the trial court to rule on the interpretation of

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[81] Id. at 2311.
[82] Id. at 2314.

the WAC provision. The trial court declined to do so.

On appeal, Evergreen's arguments center on the trial court's refusal to rule on the meaning of the WAC. Evergreen does not otherwise challenge Instruction 15.

Our supreme court considered a similar issue in Douglas.[83] There, the plaintiff prevailed in her corporate negligence claim against a dental clinic for damages arising to her lingual nerve during treatment.[84] Dr. Freeman, who performed the procedure that gave rise to the injury, was practicing dentistry at the clinic pursuant to a university residency program but was not licensed to practice dentistry in Washington.[85] The parties disputed the admissibility of evidence that Dr. Freeman was unlicensed.[86] The supreme court affirmed the trial court's decision to admit the evidence, concluding that it was relevant and any prejudice was dissipated by the clinic's discussion of statutory exemptions to the licensing requirements.[87]

The clinic also argued that the trial court erred in refusing to give proposed instructions that dental residents in certain approved programs do not need a license to legally practice dentistry when supervised by a licensed, registered dentist.[88] The supreme court upheld the trial court's decision to refuse the proposed instructions and instead give the licensing exemption

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[83] 117 Wn.2d 242.
[84] Id. at 245-46.
[85] Id. at 245.
[86] Id. at 255.
[87] Id. at 255-56.
[88] Id. at 256-57.

statute itself as an instruction.[89] The court explained that the instruction given "enabled the clinic to argue the theories it presented" in the proposed instructions, "was not misleading and correctly stated the law. The trial court did not abuse its discretion in refusing to give the two proposed instructions."[9]

Douglas is analogous to this case. In both cases, the appellant asked the trial court to rule on the interpretation of a statute or regulation as it applied to the case at hand. In both cases, the trial court instead gave the jury the text of the statute or regulation.[91] Here, as in Douglas, the instruction given allowed the appellant to argue the theories it presented. Evergreen was allowed to, and did, present evidence supporting its proposed interpretation of the WAC provision. The instruction given was not misleading and correctly stated the law. Following Douglas, the trial court did not abuse its discretion in refusing to rule on the interpretation of the WAC provision. This is particularly true here because there were factual disputes regarding whether there was a violation of the WAC and whether that violation constituted negligence.[92]

A related, but separate, issue is the trial court's decision to allow witnesses to give opinion testimony as to the meaning of WAC 246-320-365(7). Under ER 704, a witness may testify as to matters of law, but may not give legal conclusions.[93] It is normally improper for the plaintiff to call an expert witness to

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[89] Id. at 257.

[9] Id.

[91] In Douglas, the trial court gave the text of the statute at issue as a jury instruction. 117 Wn.2d at 257. Here, the trial court admitted the text of WAC 246-320-365 as substantive evidence.

[92] Report of Proceedings (Oct. 1, 2008) at 110-11.

[93] State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (citing

say the defendant violated a statute in question.[94] But even where such testimony is given, the error may be harmless.[95]

Here, both sides' experts and other witnesses were permitted to opine as to whether the WAC provision did or did not require an obstetrician to be present in the hospital 24 hours a day. On remand, the court and the parties are now alerted to the problems associated with the restrictions imposed by ER 704. We need not address this issue further in view of reversal and remand on other grounds.

EVIDENTIARY RULINGS

Evergreen argues that the trial court abused its discretion in admitting certain evidence. Each type of evidence will be addressed in turn.

Under ER 401, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[96] Evidence that is not relevant is not admissible.[97]

A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.[98] The denial of a motion

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Hyatt v. Sellen Constr. Co., 40 Wn. App. 893, 899, 700 P.2d 1164 (1985); Everett v. Diamond, 30 Wn. App. 787, 791-92, 638 P.2d 605 (1981)).

[94] See Everett, 30 Wn. App. at 791-92 (error for expert to testify that defendant violated Department of Labor and Industries standards in an action to recover on injuries sustained on work site).

[95] See id. at 792 (improper testimony was harmless).

[96] ER 401.

[97] ER 402.

[98] Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

for new trial is also reviewed for abuse of discretion.[99] "'Discretion is abused if it is exercised on untenable grounds or for untenable reasons.'"[1]

Evidence Relating to Claims Dismissed on Summary Judgment

Evergreen argues that the trial court abused its discretion in allowing the Tavareses to present evidence and argument concerning claims of negligence that had been dismissed on summary judgment before trial because the evidence was no longer relevant. Evergreen argues that the trial court further abused its discretion in denying its motion for a new trial that was partially based on this issue.

Here, the trial court granted Evergreen's motion for partial summary judgment dismissing the following claims with prejudice:

> A. Claim that personnel employed by Evergreen Hospital altered medical records;
>
> B. Claim that documentation by Carolyn Short was negligent because she did not title notes as "late entries" and because she did not write "error" after a time correction;
>
> . . . .
>
> D. Claim of negligent record keeping by Evergreen Hospital;
>
> . . . .
>
> I. Claim that Ms. Short was not an adequately trained labor and delivery nurse because she did not attend a "formal" fetal monitoring class;
>
> . . . .
>
> K. Claim that it was negligent to allow Mrs. Tavares to determine if

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[99] Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

[1] State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

the Foley catheter would come out.[101]

Evergreen moved in limine to exclude evidence and argument regarding these claims at trial. The trial court partially denied Evergreen's motions, instead allowing the Tavareses to present evidence of these claims, but precluding any evidence or argument that such evidence proximately caused the Tavareses' claimed injuries.

The trial court permitted the Tavareses to elicit testimony from their expert, Laura Mahlmeister, R.N., Ph.D., that (1) Evergreen violated the standard of care in letting Nurse Short care for Sharla without direct supervision, in part because Nurse Short had allegedly not taken a formal fetal monitoring course before working as a labor nurse; (2) Nurse Short violated the standard of care in directing Sharla to tug on her Foley catheter to see if she could remove it; and (3) the nurses violated the standard of care in several respects in their medical record documentation.

Evergreen argues that the negligence claims related to this evidence were dismissed because the Tavareses were unable to show that the incidents proximately caused their injuries. Accordingly, Evergreen argues that the claims no longer had any relevance to the lawsuit. But given the scope of Evergreen's duties under the theory of corporate negligence, as outlined by the trial court's Instruction 9, Evergreen is incorrect. Instruction 9 provides, in part,

> Defendant Evergreen Hospital is a corporation which owes an independent duty of care to its patients. This includes the duty to: Exercise reasonable care to 1) periodically monitor and review the competency of all labor and delivery nurses employed at the

[101] Clerk's Papers at 3365-366.

> hospital; 2) adopt policies and procedures for health care provided to its patients; and 3) train, support and supervise its labor and delivery nurses.[102]

Given this instruction, any evidence relating to Nurse Short's care and training was still relevant.

The evidence relating to Evergreen's negligent recordkeeping is more problematic. In our view, it is more difficult to tie this evidence to the standard of care as defined for the jury. Again, we have alerted the court and the parties to our concerns. They may address this issue further on remand.

Nurse Alati's Evaluation Statement

Evergreen argues that the trial court abused its discretion in allowing the evidence of a nurse's evaluation statement, made approximately three months before the date of Miriam's birth, because it was not relevant. We disagree.

The trial court admitted evidence of a yearly evaluation statement from Nurse Paula Alati. In the evaluation, dated February 21, 2003, Alati wrote that what least satisfied her about her job was "unsafe staffing" and "management instability." Evergreen moved in limine to limit any evidence or reference to inadequate staffing to the night of Miriam's birth, May 30, 2003, and to exclude Alati's evaluation statement.

Evergreen does not dispute that under the theory of corporate negligence and the jury instructions given, it had a duty to monitor and review the competency of its nurses, adopt policies and procedures for health care provided to its patients, and to train, support, and supervise its nurses.

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[102] Id. at 2311.

Adequate staffing is clearly an aspect of these duties, as reflected by Instruction 9, to which Evergreen did not assign error on appeal, and Instruction 14.

As the trial court recognized, "[t]he issue of adequacy of staffing is not just a numeric issue." A nurse's perceptions of the adequacy of staffing at a time within four months of the events at issue has a tendency to make a fact of consequence to the determination of the action—specifically, the adequacy of the hospital's staffing—more probable or less probable than it would be without the evidence.

Evergreen next argues that even if Alati's evaluation statement had "some marginal relevance, its probative value was substantially outweighed by the danger of unfair prejudice" and it should have been excluded under ER 403[103]. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists."[104] Alati's evaluation statement was not the type of evidence so likely to stimulate an emotional response rather than a rational decision by the jury that the trial court should have excluded it under ER 403.

We conclude that the trial court did not abuse its discretion in admitting this evidence.

OTHER CLAIMS ON APPEAL

Evergreen claims that the trial court erred in denying its motions for judgment as a matter of law because the Tavareses failed to prove proximate

[103] Brief of Appellant at 53.
[104] State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

cause. It also claims that cumulative errors deprived it of a fair trial. Because of our reversal and remand to the trial court on other grounds, we need not address these claims.

CROSS-APPEAL BY THE TAVARESES

The Tavareses argue on cross-appeal that the trial court erred in denying their motion for judgment as a matter of law[105] and a new trial on their claims for loss of parental services, consortium, emotional distress, and inconvenience.[106] We conclude that these claims are unpersuasive.

CR 50 Motion

A trial court may grant a motion for judgment as a matter of law on any claim when "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue."[107]

Denial of a motion for judgment as a matter of law is inappropriate "only when it is clear that the evidence and reasonable inferences are insufficient to support the jury's verdict."[108] The inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury's verdict.[109] This court reviews de novo the trial court's denial of a motion for judgment as a matter of

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[105] Because JNOV motions have been replaced by motions for judgment as a matter of law under CR 50, this opinion uses the current terminology. Goodman v. Goodman, 128 Wn.2d 366, 368 n.1, 907 P.2d 290 (1995).

[106] Brief of Respondents at 39.

[107] CR 50(a)(1).

[108] Industrial Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520 (1990).

[109] Id.

law.[11]

Waiver

As an initial matter, Evergreen argues that the Tavareses waived their right to raise this issue because their objection alleges an inconsistency in the verdict, which must be called to the trial court's attention at the time the jury is polled and before the jury is discharged.[111] But whether a verdict is "inconsistent" depends on the type of verdict at issue. In both cases cited by Evergreen, Minger v. Reinhard Distributing Co.[112] and Gjerde v. Fritzsche,[113] the verdicts alleged to be inconsistent were special verdicts, and a party argued on appeal that the jury's answers to interrogatories were internally inconsistent.[114]

In Guijosa v. Wal-Mart Stores, Inc.,[115] our supreme court held that two "independent" claims resulting in separately determinable general verdicts were not inconsistent.[116] The form of the verdicts in that case parallel the form used here.[117]

Here, the jury returned the following general verdicts:

> QUESTION 1: Was there negligence by the defendant that was a proximate cause of injury or damage to the plaintiff(s)?
>
> ANSWER:

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[11] Id. at 915 ("we apply the same standard as the trial court").

[111] Reply Brief of Appellant at 20; Minger v. Reinhard Distrib. Co., 87 Wn. App. 941, 946, 943 P.2d 400 (1997).

[112] 87 Wn. App. 941, 943 P.2d 400 (1997).

[113] 55 Wn. App. 387, 777 P.2d 1072 (1989).

[114] Minger, 87 Wn. App. at 945-46; Gjerde, 55 Wn. App. at 393-94.

[115] 144 Wn.2d 907, 32 P.3d 250 (2001).

[116] Id. at 920 (where jury found no liability on discrimination claims but did find CPA violations on one set of facts, verdict not inconsistent because the claims were independent and separately determinable).

[117] See id. at 918-19.

Miriam Tavares yes (Write "yes" or "no")
Sharla Tavares no (Write "yes" or "no")
Erik Tavares no (Write "yes" or "no")[118]

The jury then awarded Miriam $348,208 in past economic damages, $2,500,000 in future economic damages, and $1,400,000 in noneconomic damages.[119] It awarded no damages to either Sharla or Erik.[12]

Here, the Tavareses do not allege the type of internally inconsistent verdict discussed in Minger and Gjerde that would require objection before the trial court discharges the jury. These are general verdicts, and, as further discussed below, were independent and separately determinable. They were not inconsistent.[121] Accordingly, we conclude that the Tavareses did not waive this issue by failing to object to the verdict before the trial court discharged the jury.

Independent and Separate

Moving to the merits, the Tavareses argue that a proved tortfeasor who has caused physically and mentally disabling injuries to a minor child should be required to compensate the parents for their loss of services, consortium, mental anguish, and inconvenience.[122] Because the claims here were independent and separately determinable, we reject this argument.

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[118] Clerk's Papers at 2322.
[119] Id.
[12] Id.
[121] See Guijosa, 144 Wn.2d at 920-21 (rule requiring a party to bring inconsistent verdicts to the court's attention did not apply because the general verdicts on two claims were not inconsistent, as claims were independent and separately determinable).
[122] Brief of Respondents at 39.

Under RCW 4.24.010, a parent "may maintain or join as a party an action as plaintiff for the injury" of his or her child.[123] The statute allows parents to recover damages for "loss of services and support" as well as "loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just."[124]

In Reichelt v. Johns-Mansville Corp.,[125] our supreme court discussed the relationship between a loss of consortium claim and claims for the injury causing the loss:

> While a loss of consortium action is dependent on the occurrence of an injury to another, the claimant suffers an original injury that is the subject of the action. Thus, the injury rather than the claim is derivative. For this reason . . . the rights of the deprived spouse should not be restricted by or contingent on the rights of the impaired spouse.[126]

Accordingly, a loss of consortium action is separate and independent rather than derivative.[127] In this case, while the former action depends on the fact of injury to Miriam, the claims of the parents are original to them.

The Tavareses' central argument appears to be that because the jury found Evergreen liable for Miriam's injuries, and because they substantiated

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[123] RCW 4.24.010 ("A mother or father, or both, who has regularly contributed to the support of his or her minor child . . . may maintain or join as a party an action as plaintiff for the injury or death of the child.").

[124] Id.

[125] 107 Wn.2d 761, 733 P.2d 530 (1987) (holding, among other things, that a spouse's loss of consortium claim does not necessarily accrue at the same time as the impaired spouse's claim accrues).

[126] Id. at 774-75 (internal citations omitted).

[127] Id. at 776.

their own damages in addition to Miriam's damages, the jury's verdict was contrary to the evidence. Because their claims are independent from their daughter's and separately determinable, they are mistaken.

The Tavareses cite Palmer v. Jensen[128] for support. That case does not require a different result here.

There, a mother and son were injured in a car accident.[129] At the conclusion of their trial, the jury awarded Palmer and her son $8,414.89 and $34, respectively, in special damages, and no general damages.[13] Palmer moved for a new trial and the trial court denied her motion.[131] The court of appeals affirmed.[132] On review, the supreme court noted that "[a]lthough there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages."[133]

The Tavareses' reliance on Palmer is misplaced. Palmer assumed there was liability where the defendant's car hit the plaintiff's car from behind. The whole point of the case was whether damages were adequate in view of the undisputed liability of the defendant.

Here, the verdict form asked the jury to separately determine whether Evergreen was liable for negligence and whether that negligence was a

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[128] 132 Wn.2d 193, 937 P.2d 597 (1997).
[129] Id. at 195.
[13] Id.
[131] Id. at 196.
[132] Id.
[133] Id. at 201.

proximate cause of injury or damage to Miriam, Sharla, and Erik.[134] The jury determined that Evergreen was liable to Miriam.[135] But the jury also determined that Evergreen was not liable to either Sharla or Erik. In the absence of a jury determination that Evergreen was liable to either parent for negligence, the question of damages is irrelevant.

Consequently, the real question for review of the CR 50 motion is whether there is substantial evidence to support the jury's verdict that Evergreen was not liable to either Sharla or Erik.[136] We conclude there is substantial evidence to support the jury's verdicts on the parents' claims.

Here, as discussed in Reichelt, Erik and Sharla's actions for loss of consortium are separate and independent from Miriam's claims.[137] Erik and Sharla appear to agree, noting in their reply brief that "Miriam's bodily injury claims and her parents' loss of services and consortium claims ***were independent causes of action***."[138] Consequently, the jury was not required to find Evergreen liable to Erik or Sharla because it found Evergreen liable to their daughter, Miriam.

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[134] Clerk's Papers at 2322.

[135] Id.

[136] See Industrial Indem. Co., 114 Wn.2d at 916 (Denial of a motion for judgment as a matter of law is inappropriate "only when it is clear that the evidence and reasonable inferences are insufficient to support the jury's verdict."); see also Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997) (granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party).

[137] Reichelt, 107 Wn.2d at 776.

[138] Reply Brief of Respondents/Cross-Appellants at 3 (emphasis added).

To the extent they claim that the jury's adverse verdict is not supported by substantial evidence in the record, such that the trial court improperly denied their motion for judgment as a matter of law, they are wrong.

The Tavareses argue that "under the jury instructions and clearly established legal authority, the jury's verdict that the hospital's negligence proximately caused Miriam's bodily injury inescapably means that the hospital's negligence also proximately caused her parents' loss of services and consortium."[139] This is not so because the claims are independent and separately determinable.

The trial court decided that neither parent of the child could be held at fault for Miriam's outcome. Specifically, unchallenged Instruction 13 stated: "Sharla and Erik Tavares were not at fault for, and did not proximately cause, Miriam Tavares' outcome in this case."[14]

However, the court also expressly ruled that Evergreen could argue that the parents made choices to proceed with an attempt at VBAC against strong medical advice.[141] The jury heard substantial evidence to support this argument.

Miriam was the result of Sharla's second high-risk pregnancy.[142] Dr. Stemmerman, Sharla's prenatal obstetrician, repeatedly advised Sharla to have a C-section, and the Tavareses repeatedly declined.[143] They wanted to continue

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[139] Reply Brief of Respondents/Cross-Appellants at 14 (citing Clerk's Papers at 2313, 2314, 2318).

[14] Clerk's Papers at 2314.

[141] Report of Proceedings (Sept. 2, 2008) at 95-97.

[142] Report of Proceedings (Sept. 18, 2008) at 14.

[143] Report of Proceedings (Sept. 17, 2008) at 184-89.

to try to allow Sharla to go into labor on her own, even after their obstetrician advised them that she "didn't want them to be pregnant any longer," that she wanted to schedule a C-section, and that there was a risk of another placental abruption.[144]

During closing, Evergreen argued, without objection, that the parents made choices that had consequences although they could not be faulted for them.[145] This was consistent with the evidence, the court's instructions, and its oral ruling.

In short, there was substantial evidence to support the jury's verdict that Evergreen was not liable for the parents' claims because they chose to go forward with another high-risk pregnancy, notwithstanding medical advice to the contrary. While the parents were not at fault for this decision and did not proximately cause Miriam's outcome, the jury was entitled to find that Evergreen was not liable for the claims asserted solely by the parents. The trial court properly denied the motion for judgment as a matter of law.

CR 59

The Tavareses also claim the court abused its discretion in denying them relief on their request for a new trial on damages. We disagree.

A court's ruling on a motion for new trial is reviewed for abuse of discretion.[146] A court abuses its discretion when the jury award is contrary to the

[144] Id. at 185.
[145] Report of Proceedings (Oct. 1, 2008) at 40-41.
[146] Aluminum Co. of Am., 140 Wn.2d at 537.

evidence.[147]

Here, the same reasons that support affirming the trial court's denial of the Tavareses' motion for judgment as a matter of law also support its denial of their motion for a new trial. The jury's decision to not award any damages flowed from its determination that there was no liability. The decision was not contrary to the evidence. The trial court did not abuse its discretion in denying the motion.

Evergreen argues that it should be allowed to revive its theory of contributory fault in connection with Erik and Sharla's claims in the event of a new trial. Because there is no basis for a new trial on the parents' claims, this issue is now moot.

We affirm in part, reverse in part, and remand for further proceedings.

Cox, J.

WE CONCUR:

[147] Locke v. City of Seattle, 162 Wn.2d 474, 486, 172 P.3d 705 (2007).

Schindler, J. Grosse, J.